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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

ERNEST W. MULLINS, JR., and
IVAN MULLINS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. COGAN
One North La Salle Street
Chicago, Illinois 60601

ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioners

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Ernest W. Mullins, Jr., and Ivan Mullins, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the cases there entitled, *United States of America* v. *Ernest W. Mullins, Jr.*, No. 14837, and *United States of America* v. *Ivan Mullins*, No. 15000.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 21, 1966, and is not yet reported; it appears in the printed Appendix filed herein and in the record filed simultaneously herewith, and certified by, the Clerk of the United States Court of Appeals.

The Petition for Rehearing was denied on March 2, 1966, and the order denying said Petition is set forth in the Petitioners' Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Fort Wayne Division, was filed on January 21, 1966. On the 2nd day of March, 1966, it was ordered that the Petition for Rehearing be denied. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where willfulness is a necessary element for conviction of a principal, must not the acts of an accessory also be willful, so that only subsection (b) of Section 2, Title 18, U.S.C. is applicable in the charges made against the accessory?

2. Since Chapter 31 of Title 18, U.S.C., comprises 23 separate sections; including embezzlement, misappropriation, theft, conversion, etc., and only Section 656 of that chapter requires the willful doing of the act proscribed therein, is the willful element satisfied simply by showing

a voluntary act, with knowledge it was prohibited by law, and with the purpose of violating the law?

3. When the indictment charges that, by the misapplication of funds of the bank, those funds were converted and misapplied to the use and benefit of a named person "and divers other persons to the grand jurors unknown", may the person named in the indictment be treated as surplusage?

STATUTES INVOLVED

Title 18, U.S.C., Section 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, Section 17b, 65 Stat. 717."

Title 18, U.S.C., Section 656:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody of care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than

five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. June 25, 1948 c. 645, 62 Stat. 729."

STATEMENT OF THE CASE

This action was commenced by the return of an indictment charging the Petitioners, Ernest W. Mullins, Jr., and Ivan Mullins, in eight counts, with violations of Section 656, Title 18, United States Code, in that they did aid and abet one Glen B. Garrott, the cashier of the Farmer's State Bank at Brookston, Indiana, in the misapplication of monies, funds and credits of that bank. The indictment further charges that, by such misapplication, stated sums of monies, funds and credits of the Bank were depleted and lost to it and, in the first four counts, that such monies, funds and credits were then converted and misapplied to the use of Ivan Mullins, and divers other persons to the grand jurors unknown; and, in counts five through eight, that the stated sums of monies were then converted and misapplied to the use and benefit of Ernest Mullins, and divers other persons to the grand jurors unknown.

Pleas of not guilty were entered on behalf of both Petitioners on October 29, 1963. (I.A. 3; E.A. 5). A motion to dismiss counts one through four as to Ernest W. Mullins,

Jr., because no facts were stated therein as to him, and a similar motion to dismiss Ivan Mullins from counts five through eight was denied. However, on July 13, 1964, counts one through four were severed from counts five through eight on order of court. (I.A. 6; E.A. 8). On July 20, 1964, Petitioner Ernest W. Mullins, Jr., was put to trial on counts five through eight, and on July 22, 1964, a verdict of guilty was returned, upon which judgment entered. (E.A. 8-9). On October 12, 1964, Ivan Mullins was put to trial on counts one through four of the indictment and on October 13, 1964, a verdict of guilty was returned, upon which judgment entered. (I.A. 6-7)

On August 29, 1964, Ernest W. Mullins, Jr., was ordered committed to the custody of the Attorney General to a period of two years on each of counts five through eight, said sentences to run concurrently one with the other (E.A. 10). On November 19, 1964, Petitioner Ivan Mullins was sentenced to periods of three years on each of counts one through four, said sentences to run concurrently. (I.A. 8)

On separate appeals to the United States Court of Appeals for the Seventh Circuit, it was contended as to both Petitioners that the indictment did not charge a crime by such Petitioner that is sanctioned by law; that the proof did not sustain the convictions under the charges made, and, that the court erred in instructing the jury and in failing to instruct the jury as requested by each of the Petitioners in the respective trials. Petitioner Ivan Mullins, also contended that conviction rested on improper evidence and that cross-examination by him was unduly restricted.

STATEMENT OF FACTS

The Farmer's State Bank is an institution the accounts of which are insured by the Federal Deposit Insurance Corporation. An audit of the Farmer's State Bank conducted by qualified independent auditors disclosed a shortage existing as of June 1, 1962. (I.A. 50)

At all the times pertinent hereto, Farmer's State Bank of Brookston, Indiana, was a family-operated bank. Floyd Garrott, the father, was vice-president; John Garrott, a son, was President; Glen B. Garrott, a son, cashier. Glen controlled the operation of the bank. (E.A. 27)

The association of Glen B. Garrott and Ernest Mullins began in 1948 or 1949, though they knew each other since 1947. (A.E. 45, 51). Mr. Mullins had a note at Farmer's State Bank in Brookston, Indiana, which wasn't paid as agreed. The examining authorities ordered the bank to eliminate the note from its assets and the bank was required to charge it off. Garrott testified he believed in Mr. Mullins, and when Mr. Mullins came to see him with a proposition that if he just had some money the two of them could go into business and through the profits of the business pick up this note, Garrott considered the proposition sound. The business concerned a product known as Quick-Brick, a form of siding. Garrott activated a corporate charter he had had for some time by the name of G & T Manufacturing Corporation (E.A. 44). He took Mullins to the American Fletcher Bank in Indianapolis and pledging some of his own collateral, though he considered Ernest a poor credit risk (E.A. 52), they secured a loan for $15,000.00, out of which the note at the bank was to be picked up. Eventually Garrott repaid the $15,000 out of his personal funds (E. A. 54).

The Quick-Brick operation was conducted by Mullins. Apparently from the inception of the operation or before,

Garrott was writing fraudulent cashier's checks, and these he covered up by using a plugged figure entered on demand deposits on the books of the bank (E.A. 58). The plugged figure he gave the bank's employees each day (E.A. 26). For 14 years, the employees knew the books were being juggled (E.A. 28, 35-36). According to Garrott, after a while it appeared that Garrott was putting too much restriction on Mullins' activities, so Mullins started operating under the firm of Exterior Contracting Company, which did primarily tuckpointing, surfacing, mortaring and waterproofing of the exterior of buildings. Ernest ran Exterior (E.A. 65). Exterior Contracting Company was started around 1952.

After that Garrott testified he had no say in the management or the operation of the firm. He did, however, make cashier's checks to deliver with bids, co-sign fidelity bonds to insure performance and made out financial statements for Exterior (E.A. 72, 74, 75). Garrott had a loss of $50,000 amounts (E.A. 44-45). Though in 1952 or '53, Garrott realized Ernest was a bad business man, and imprudent and that he was not going to make money backing Ernest, and though he wasn't a good friend nor were they socially related to him (E.A. 57), eventually Garrott personally loaned $200,000 to Ernest, for which Ernest gave him notes (E.A. 52-54). This money went to pay legitimate bills of Exterior (E.A. 61). Exterior had an account at the Farmer's State Bank in Brookston which they used. When operating on his own as Exterior Contracting Company, Mullins told Garrott that if he just had the money to do the jobs and complete the work he had lined up, he would get Garrott paid for all the money he had lost in G & T Manufacturing Company. This occurred about 1953 (E.A. 45). In 1959 Exterior started building swimming pools (E.A. 71). From 1952 to 1962 Ernest Mullins

ran the business, paid the help and paid the bills for operation by checks on Farmer's State Bank, though there was insufficient money in the account for the checks to be honored legitimately.

Ivan Mullins was a salaried employee of Exterior Contracting Company, making about $125 per week. Exterior was owned by Ivan's brother, Ernest, but Ivan just worked there (I.A. 35, 36, 37-38, 43). Nor did Ivan have anything to do with Exterior's account at Farmer's State Bank. (I.A. 32)

When checks came drawn on the Exterior account and the balance in the account was not sufficient, the checks were kept in the bookkeeping department until Garrott picked them up (I.A. 24). Garrott would keep a record of the amount of such checks and make bookkeeping entries on the books to cover the fact that the funds were not sufficient. From time to time with his own funds he would clear up those checks and from time to time Exterior Contracting would send a deposit and those funds would be used to take care of part of the delinquent checks (I.A. 32). These collections were in excess of $1,000,000 (E.A. 66).

Prior to 1962, a deposit was made about the time the examiners came to cover up the shortage represented by a plugged or faked figure (I.A. 22). In between the yearly bank examinations he and the employees of the Farmer's State Bank covered the shortages just by bookkeeping entries. Garrott knew to the penny just how much it took to cover them because he kept a running total on the checks that had been written by Exterior Contracting Company. He would then make a debit entry to cover the shortages on the demand deposits. From time to time he had other persons make entries on the books and records under his direction and control (I.A. 33-34). He eventually made such big entries on the books that he knew anybody

with average intelligence would look askance at some of the bookkeeping entries, so he started erasing those figures and reducing the material so the books didn't look so cock-eyed. He, himself, made some of these entries and one Bill North made some (I.A. 23, 25). For the 13 years prior to 1962 he was always able to clean up these shortages with his own funds from time to time.

Around 1962, Garrott ran out of money, and the assets he had remaining were unsaleable (I.A. 44-45).

Realizing a bank examination was impending, and his experience causing him to realize that such examination would start any Monday morning, Garrott devised a system so that when Saturday closing time came there would be no checks that Garrott was holding for Exterior Contracting company (E.A. 46).

Ernest and Garrott decided that they would work out a check kite, through the use of cashier's checks Garrott would write. Garrott testified he never discussed the kite with anyone but Ernest, and only Ernest knew about the issuance of the cashier's checks (E.A. 47, 50-51). Garrott testified he explained what he was doing to Ivan (I.A. 32-33).

His check kiting scheme consisted of giving a cashier's check for some amount of money and Ivan Mullins, or his brother Ernest, or Allied Electric in one instance, would give blank checks (Government's Exhibit 5A-5G) on other banks to Garrott to use, which Garrott filled in in the approximate amount of the cashier's checks. Garrott would then send their checks to Farmer's State Bank's correspondent bank for credit. The Mullins' or Allied Electric would then take the cashier's check and deposit it in their bank to cover the check that they had given Garrott when it got there. Garrott testified that the funds of the

Farmer's State Bank would be covering the Mullins' check.

The usual procedure was that Garrott and the Mullins' would have a phone conversation and Garrott would tell Ivan what Garrott had to have and what he was making out the cashier's check for and that Garrott would be sending a cashier's check for a sufficient sum to cover the amount of the checks that Ivan had left with him. In each instance the cashier's check was written in the amount of a few dollars more than the outstanding Exterior checks it covered (I.A. 34).

One of the Mullins' would deposit the cashier's checks, when it was received, in the bank where the other checks were drawn on, so that when the checks came into the bank where they were drawn on, there was money there to pay it. The Count checks all drawn by Garrott are cashier's checks made in this manner and for the purpose of making the books balance.

The shortage that existed for 13 years was discovered in July, 1963 (I.A. 16). There were several hundred blank checks (Government's Exhibit 14) in Garrott's desk when the fraud was discovered (I.A. 29), some of which were signed by the Mullins' (I.A. 30).

The monies that were dissipated, $200,000 of Garrott's money and $700,000 of the bank's money, were used in the operation of the business of Exterior Contracting Company for the benefit of Ernest Mullins (I.A. 46, 47). The purpose of the issuance of the cashier's checks was to cover up for Garrott's defalcations (I.A. 48).

None of the said Count checks were entered on the books and records of Farmer's State Bank as liabilities, though they should have been. When the checks were returned, Garrott took them to his drawer and started his list all

over again, to replace the funds involved in the check kite (E.A. 50, I.S. 17, 29).

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit for the following reasons:

1. No authoritative interpretation of the distinction in application of Subsection (a) and (b) of Section 2, Title 18, U.S.C, has been made. A distinction was obviously intended by the Congress when it amended the statute in 1951 to add *willfulness* to Subsection (b). This distinction is an important question of Federal law that has not been, but should be, decided by this court.

2. In circumstances where only one of 23 Sections comprising Chapter 31 of Title 18, U.S.C. requires the showing of willfulness as a necessary element, the Court of Appeals sanction of the trial court's instruction that it need only to be proved that "the act was committed voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law" conflicts with this court's decision in *United States* v. *Murdock,* 290 U.S. 389.

3. The treating as surplusage words of the charging paragraphs of the indictment constituted an amendment in violation of this court's ruling in *Ex parte Bain,* 121 U.S. 1 and *Stirone* v. *U.S.,* 361 U.S. 212.

I.

The indictment so far as it is applicable to the aiding and abetting statute (Section 2, Title 18, U.S.C.) alleges that "Ernest W. Mullins, Jr., and Ivan Mullins, doing business as Exterior Contracting Company, having aided

and abetted the said Glen B. Garrott in committing an offense against the United States, are principals herein under the provisions of Section 2, Title 18 of the United States Code" (I.A. 9). These Petitioners objected to the sufficiency of the indictment since Section 656 has an essential element, the element of willfulness. These Petitioners contended that since only Subsection (b) of Section 2 of Title 18 requires willfulness on the part of an accessory, only Subection (b) was applicable in determining the guilt or innocence of the Petitioners (E.A. 88; I.A. 53). The Petitioners requested that the jury be charged, in determining Petitioners' guilt or innocence as accessories, in accordance with the language of said Subsection (b). This, notwithstanding, the court charged the jury only in the language of Subsection (a) of Section 2, Title 18, U.S.C. (E.A. 95; I.A. 62-3). In other words, the court charged the jury as though Subsection (b) did not exiist in the law. Such charging happens with alarming frequency in trial courts. We submit that under the particular circumstances of this case, where these Petitioners were incapable of committing the crime proscribed by statute, but when capable of committing the crime must have done it "willfully", the accessory must also act with willfulness.

There is a distinction where the statute simply denounces the doing of an act as criminal and where it denounces as criminal only as willful doing. See *Hargrove* v. *United States,* 5 Cir., 67 F. 2d 820. In the first class of cases, especially in those mala prohibita, the law imputes the intent. In the second class of cases, a specific wrongful intent is of the essence. It is inconceivable, especially in cases such as these, where the Petitioners Mullins, can only be guilty as accessories of the principal Garrott, that the Government should be relieved of pleading and prov-

ing as to them the bad motive and evil intent required to prove Garrott guilty. The indictment omitting any requirement of proof that the action of the accessory was willful is deficient.

It is our submission that conviction will not lie on a lower standard of proof for an accessory, than is required for the principal, and it is essential that the act for which it is sought to convict the accessory must be pleaded so as to require the same degree of proof as an act required to convict the principal. It is, therefore, our contention that only Subsection (b) of Section 2 of Title 18, United States Code is applicable in a case where wilfulness is a necessary element for conviction of a principal. It is our contention that when the acts of a principal must be done with a bad purpose and an evil motive, a bad purpose and evil motive must be required for conviction of an accessory.

It is our submission to this court that for effective use of Section 2 of Title 18, U.S.C., a defined distinction between the Subsection is imperative, and constitutes an important Federal question which has not been, but should be, decided by this court.

II.

It is submitted that the trial court erroneously instructed the jury on what constitutes "willfulness" under the state statute, and the United States Court of Appeals for the Seventh Circuit compounded the error by approving the instruction. The Court instructed the jury as follows:

> "The word 'willfully' as used in the crime charged means that the act was committed voluntarily, with knowleedge that it was prohibited by law, and with the purpose of violating the law and not by mistake, accident, or in good faith." (I.A. 63; E.A. 96)

It was the submission of the Petitioners that a stronger interpretation of willfulness was required in the circumstance, and the jury be instructed that willfulness requires proof of bad purpose or evil intent. It is the submission of the Petitioners that the instruction given is directly contradictory of this court's determination in *United States* v. *Murdock*, 290 U.S. 389. In that case the Supreme Court said that "willfully" often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental (290 U.S. 389). But, this Court made it clear that such a definition was relegated to *civil* willfulness, for it continued:

> "But, when used in a criminal statute, it generally means an act done with a bad purpose (cases cited); without justifiable excuse (cases cited); stubbornly, obstinately, perversely (cases cited). The word is also employed to characterize a thing done without ground for believing it is lawful (cases cited), or conduct marked by careless disregard whether or not one has the right so to act (cases cited)." 290 U.S. at 394.

This Court made it clear these several definitions are not interchangeable or optional but that the work "willfully" derives its meaning from the context in which it is used. It suggests that in order to determine the intensity of the element, the surrounding circumstances must be looked into. We direct the Court's attention to the surrounding circumstances of this statute. Chapter 31 of Title 18 is entitled "Embezzlement and Theft", and comprises 23 separate sections or acts. It includes embezzlement, misappropriation, theft, conversion, etc. But the only one of these many acts that requires wilfulness is misapplication. In the light of the surrounding circumstances, it seems obvious, all of these separate acts defining felonies with large periods of imprisonment possible, that a strong definition of "wilfulness" is appropri-

ate in the circumstances. We submit that the Court erred, in giving the civil definition of "wilfully". Appropriate to the circumstances are the words of this Court in Murdock:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense." *United States* v. *Murdock,* 290 U.S. 389, 398.

We submit that the instruction given relative to the standard proof of wilfulness in these circumstances violates this court's ruling.

III.

Counts one through four of the indictment charge that the "monies, funds and credits of the bank . . . were then converted and misapplied to the use and benefit of Ivan Mullins and divers other persons to the grand jurors unknown. . . ." (I.A. 10-12)

The evidence, regarding the proceeds, if any, from the cashier's checks was unconditionally and unequivocally that the purpose of the issuance of the cashier's checks was to cover up Garrott's defalcations (I.A. 48). The underlying defalcations, covered by the cashier's checks, went to the use and benefit of Ernest Mullins. (I.A. 46, 47)

The trial court concurred that there had been a failure of proof on this allegation.

> "I will only refer to the one argued principally by Miss Lavin that here there was nothing to show that as charged in the indictment that the funds were then converted and misapplied to the use and benefit of Ivan Mullins, and divers other persons to the grand jurors unknown.
>
> • • •

> "Each count of the indictment in this case alleges the monies, funds, credits of the bank were converted and misapplied to the use and benefit of Ivan Mullins and divers other persons. Title 18, United States Code, Section 656 describes misapplication which the instructions of this Court defines as conversions to one's own use, or in the disjunctive, the use of another . . . It is my opinion, therefore, that the words 'Ivan Mullins and' may be treated as surplusage and as such may be disregarded . . . Actually, the Government imposed by this surplusage a greater burden than the statute imposes. The Government added, if anything, to the crime.
>
> "I think that not only is my opinion correct that they can be disregarded, but under these circumstances and under the statute they should be disregarded." (I.A. 72-73)

Assuming as the trial court did, that "the government imposed by this surplusage a greater burden than the statute imposes", the Government assumed a greater burden of proof.

> "It would have been sufficient to charge the offense in more general terms, but, the pleader having elected to name the particular premises, the description became matter of substance to be proved as alleged." *Anderson* v. *United States,* 5 Cir., 30 F. 2d 485, 486.

To the same effect see the Tenth Circuit decision in *Marteney* v. *United States,* 216 F. 2d 760 where the court said at page 763:

> "But the counts involved in this indictment did not stop with the statement of the offense in the words of the statute. They went on to affirmatively allege in what factual respect the warehouse receipts were 'falsely made, forged, altered, or counterfeited', by stating that the issuing warehouse did not have in storage the grain represented by the receipt. This allegation is not mere surplusage which may be

stricken from the indictment or information on motion of the defendant under Rule 7(d) of the Federal Rules of Criminal Procedure; it was obviously intended to critically describe the nature of the document or instrument transported in interstate commerce.'' *Marteney* v. *United States,* 10 Cir., 216 F. 2d 760, 763.

But we submit further, that this allegation is more than detail. The indictment reads that the funds of the Farmers State Bank ''were then converted and misapplied to the use and benefit of Ivan Mullins, and diverse persons to the Grand Jurors unknown, . . .'' It is our submission that the allegation charges an essential element of the offense. As the Supreme Court said in *United States* v. *Britton,* 107 U.S. 655 at pages 656-7:

> "We think the willful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be conversion *to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offense* is not averred in the counts under consideration, . . ." (Our emphasis.)

Even were the allegation not essential, it cannot be stricken as surplusage since it occurs in the charging part of the indictment. This was made clear in *Ex parte Bain,* 121 U.S. 1, where the Court said at pages 9-10:

> "The learned judge who presided in the circuit court at the time the change was made in this indictment, says that the court allowed the words, 'comptroller of the currency and,' to be stricken out as surplusage, and required the defendant, to plead to the indictment, as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this

branch of the case, rests the validity of the court's action in permitting the change in the indictment upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of the court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to

> a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

The fact that the words were not actually stricken from the indictment, as was done in *Bain,* makes no difference in the effect of disregarding such words as surplusage. In *Stirone* v. *United States,* 361 U.S. 212, the Court said at pages 217 and 218,

> "The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare *Ford* v. *United States,* 273 U.S. 593, 602, 47 S.Ct. 531, 534, 71 L.Ed. 793; *Goto* v. *Lane,* 265 U.S. 393, 402, 44 S.Ct. 525, 527, 68 L.Ed. 1070. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger* v. *United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens

acting independently of either prosecuting attorney or judge." *Stirone* v. *United States,* 361 U.S. 212, 217, 218.

CONCLUSION

Wherefore, these Petitioners pray this court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

JOHN J. COGAN,
ANNA R. LAVIN,
Attorneys for Petitioners

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965 JANUARY SESSION, 1966
Nos. 14837, 15000

No. 14837
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ERNEST W. MULLINS, JR.,
Defendant-Appellant.
No. 15000
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
IVAN MULLINS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne, Division.

JANUARY 21, 1966

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* Ernest and Ivan Mullins, brothers, were tried separately and convicted as principals of aiding and abetting[1] Glen B. Garrott, cashier of Farmers State Bank in Brookston, Indiana, in a wilful misapplication of bank funds and credits in violation of Section 656,

[1] 18 U.S.C. §2.

Title 18, United States Code. Both Mullinses have appealed and, because of common questions raised, we consider the appeals together. We affirm the convictions.

Garrott was cashier of the Farmers State Bank (hereafter referred to as Bank) when in 1948 or 1949 his association with Ernest Mullins began. Later Garrott met Ernest's brother Ivan. Garrott and Ernest Mullins began a business association which eventuated in the indictments. Originally both owned G & T Manufacturing Corporation, with Garrott arranging the financing, and they apparently commenced operation of the business with Garrott's issuing fraudulent cashier's check against the Bank, using a "plugged figure"[2] on the Bank's books to cover the fraud. Subsequently Ernest Mullins started a new business venture under the name Exterior Contracting Company. He owned and ran the company and employed his brother Ivan.

Garrott, although at the trials disclaiming any ownership or managerial interest in Exterior, continued his fraudulent conduct in rendering financial assistance to Exterior through Ernest and Ivan Mullins. He used about $200,000 of his own money and about $700,000 of the Bank's in paying Exterior checks drawn upon the Bank without sufficient funds. Garrott would hold the checks in a desk drawer until he could "pick them up" with his own money or a collection from Exterior. He kept an accurate record of what the "plugged figure" had to be for the checks which were not covered legitimately. He induced other Bank employees to cooperate with him in concealing the fraud. In the beginning he would make up the difference with his own funds before the bank examiners would come in. This had continued for a period of more than thirteen years when, in July of 1963, the fraud was discovered, at which time the "plugged figure" was approximately $600,000.

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[2] Witnesses explained that a "plugged figure" was a "faked figure" entered on the Bank's books to cover Exterior checks which were not covered by funds in Exterior's account.

An official examination of the Bank was impending in 1962. Garrott, then without money of his own, conceived the idea of a "check kite" to keep the Bank's books in balance while the examination was under way, *i.e.*, so that he would not be holding any checks for Exterior on a Monday morning, when the examiners arrived. The kiting worked this way, for example: Ernest or Ivan Mullins would give Garrott an Exterior check drawn on a distant bank sufficient in amount[3] to "pick up" the accumulated overdrawn checks of Exterior which had been concealed by Garrott. The account in the distant bank would not be sufficient to cover the check. The check would be deposited in the Bank to cover the accumulated checks, and then sent to the distant drawer bank for payment. Garrott would then issue a cashier's check[4] to Exterior, a bit more than the Exterior check which Mullins would deposit in the distant drawer bank. Garrott did not enter the cashier's checks on the Bank's books as liabilities. When the cashier's checks were returned, Garrott took them to his drawer and started his records all over again.

The indictment charged each Mullins brother with aiding and abetting Garrott, a bank officer, in the violation of Section 656, and consequently their liability to punishment is that of a principal under Section 2, Title 18, United States Code.

The general charge in the indictment of aiding and abetting Garrott is particularized in each of the four counts against each Mullins with the further charge that

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[3] Some were signed in blank, which Garrott then filled in for the appropriate amount.

[4] Each of the four counts against Ernest Mullins is based on a different check: Count V, in the sum of $75,900.00; Count VI, $100,000.00; Count VII, $90,000.00; and Count VIII, $110,000.00. Count I against Ivan Mullins was based on a check for $45,000.00; Count II, $63,200.00; Count III, $42,750.00; and Count IV, $42,250.00. The checks in Counts I-IV were endorsed for Exterior by Ernest.

said Mullins and Garrott "with intent to defraud . . . did wilfully misapply . . . moneys, funds and credits of the Bank . . . in that Glen B. Garrott . . . did issue and deliver a Cashier's check drawn by the Bank upon itself, . . . payable to Exterior Contracting Company and endorsed Exterior Contracting Company by . . . [Ivan or Ernest] Mullins, . . . [when each] then and there knew said Cashier's check was issued without sufficient consideration . . . , whereby the possession, control and use . . . of the moneys, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of . . . [each] Mullins . . . ."

Both Ernest and Ivan Mullins contend that the indictment is fatally defective in that it neither charges "how Mullins aided and abetted" nor alleges "wilful" action[5] or "a bad purpose and an evil motive" by defendants.[6]

We think the alleged action of each Mullins in endorsing the cashier's checks, with knowledge that there was no consideration even though it followed the alleged action of Garrott in issuing the checks, was sufficient to charge "how" each Mullins aided and abetted, and to "associate" each brother as a participator in the alleged unlawful enterprise he worked to bring about. *Benchwick v. United States,* 297 F.2d 330, 334-35 (9th Cir. 1961); *United States v. Chiarella,* 184 F.2d 903, 909 (2d Cir. 1950), *cert. denied* 341 U.S. 956 (1951). And while it is true than an intent to injure or defraud the Bank is an essential element of the offense (Section 656) defendants allegedly aided the commission of, we think that this element is sufficiently alleged here in the words that each Mullins, and Garrott, "with intent to defraud" did "wilfully misapply" the Bank's funds. *Logsdon v. United States,* 253 F.2d 12, 14 (6th Cir. 1958).

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[5] The crime it was alleged they aided Garrott in committing, 18 U.S.C. § 656, requires a wilful misapplication.

[6] Each defendant had made a motion to dismiss the indictment on these grounds.

We see no merit in the contention of each Mullins that the proof fails to support a finding that the checks issued "without sufficient consideration," that the amounts of the checks were lost to the Bank or its assets depleted, that said Mullins converted the proceeds to his own use or benefit, or that the checks were issued with the intent of defrauding the Bank. Both Mullinses argue that the funds were lost long before the issuance, in 1962, of these cashier's checks, and that the proof shows concealment and falsification by Garrott, but not the crime charged in the indictment, *i.e.*, their aiding and abetting a wilful misapplication of Bank funds.

Garrott pleaded guilty to the indictment and among other things testified for the Government in both trials that no consideration and no "money" was received by the Bank for the cashier's checks in the four counts of each indictment; that the checks drawn by Ivan and Ernest Mullins were covered by the cashier's checks issued by Garrott at times when Exterior's balance on account at the Bank was only nominal.[1] He further testified in both trials that the loss suffered by the Bank was "made good" by insurance and that from time to time he used Bank funds to pay "fraudulently" drawn checks. Also he stated that Ivan and Ernest Mullins endorsed the cashier's checks, that the proceeds of the cashier's checks, subject of the indictment, were used to pay bills of Exterior, that Exterior got the excess that remained, the Ernest Mullins ran, and Ivan Mullins was employed by, Exterior, and that he had discussed details of the check kite with both defendants on numerous occasions. We think this testimony was sufficient to support the findings subject of the foregoing contention. *Benchwick v. United States*, 297 F.2d 330 (9th Cir. 1961). With respect to Ivan Mullins, there

[1] *E.g.*, when the $75,900.00 check issued, the Exterior balance in the Bank was $6.31; when the $100,000.00 check issued the balance was $130.04; when the $90,000.00 check issued the balance was $130.04; and when the $110,000.00 check issued the balance was still $130.04.

is testimony that he "used" the proceeds of the cashier's checks and the proof that he or some other person benefited by the Bank's money or credit is enough. *United States v. Matsinger,* 191 F.2d 1014, 1017 (3rd Cir. 1951).

We find no error in the instructions complained of by the Mullinses. Ernest claims that, in discussing the Government's burden of proof, the court should have contemplated defendant's evidence so that the jury would consider all the evidence in determining reasonable doubt. We agree with the Government that subsequent instructions satisfactorily covered the point. We think the court did not err in both trials in defining "wilfully" to mean "that the act was committed voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident, or in good faith." This instruction was taken from a manual on jury instructions in criminal cases drafted by a committee headed by Judge Walter J. LaBuy.[8] The same is true of the court's definition of "knew."[9]

Ernest alone contends that the charge given on specific intent is "absolutely erroneous." We disagree, as this instruction too is taken from the manual,[10] and the court fully instructed that an essential element of this offense is that Ernest acted "with the specific intent to defraud the bank." Ivan argues further that the court erred in its instruction concerning credibility of testimony of an accomplice, and in refusing to give his instruction on this point.[11]

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[8] SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, § 4.06 (1965) (hereafter cited as JURY INSTRUCTIONS), also reported at 33 F.R.D. 553. The instructions in the manual are supported by the latest case law and comments.

[9] JURY INSTRUCTIONS, § 4.05; 33 F.D.R. 553.

[10] JURY INSTRUCTIONS, § 4.04; 33 F.R.D. 550-51.

[11] Which stated that "too much reliance should not be placed upon it unless it is corroborated by other credible evidence."

We disagree, as the cautionary instruction given,[12] and the balancing instruction as to all witnesses, adequately state the law. Likewise, the balancing instruction given with respect to all witnesses justifies the instruction given with respect to the credibility of defendant Ernest as a witness in his own behalf. *United States v. Marshall,* 266 F.2d 92, 95 (7th Cir. 1959). Our review of the instructions as a whole shows that the juries in both trials were fairly charged.

We think the evidence amply supports a finding of guilty knowledge on the part of Ivan Mullins. The testimony of Garrott concerning his dealings with Ivan Mullins with respect to the Terre Haute bank, and of his detailed explanation to Ivan of the "check kiting scheme," is sufficient without the testimony of Alberta Ade, Garrott's assistant, concerning a later telephone conversation. And Garrott's testimony in the Ernest Mullins trial was not contrary to his testimony in the later Ivan Mullins trial. Garrott explained that in Ernest's earlier trial his testimony was confined to the four cashier's checks which were the basis of the counts charged against Ernest Mullins. Finally we cannot say that the district court abused its discretion in limiting the cross-examination of Garrott with respect to the disposition of "another indictment" pending against him. He had already testified on cross-examination that he was serving sentence upon his plea of guilty to the charge in this case, and on redirect testified that he received no "promises, threats or inducements" for his testimony in either case.

Each defendant has raised other minor contentions, which we have considered and find to be of no merit.

Judgments and convictions affirmed.

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[12] An identical instruction was approved in *United States v. Echeles,* 222 F.2d 144, 160 (7th Cir.), *cert. denied,* 350 U.S. 828 (1955).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, January 21, 1966

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. No. 14837, 15000 ERNEST W. MULLINS, JR., IVAN MULLINS, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Indiana, Fort Wayne Division

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments and convictions of the said District Court in this cause appealed from be, and the same are hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, March 2, 1966

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

No. 14837, 15000
ERNEST W. MULLINS, JR.,
IVAN MULLINS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

It Is Ordered by the Court that the petition for a rehearing of these causes be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1176

ERNEST W. MULLINS, JR., AND IVAN MULLINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1966. A petition for rehearing was denied on March 2, 1966. The petition for a writ of certiorari was filed on April 1, 1966. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

1. Whether the indictment alleged that petitioners had acted wilfully in aiding and abetting in the misapplication of bank funds.

2. Whether the court's instructions to the jury on the element of wilfulness were proper.

3. Whether the trial court erred in disregarding part of the indictment as surplusage.

STATUTES INVOLVED

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 656 provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or

willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

STATEMENT

Petitioners, who were each charged in four counts of an eight-count indictment in the United States District Court for the Northern District of Indiana, were tried separately and convicted of aiding and abetting Glen B. Garrott, cashier of Farmers State Bank of Brookston, Indiana, in a wilful misappropriation of bank funds in violation of 18 U.S.C. 656 (E.A. 9, 11-14; I.A. 7, 9-12).[1] Ernest Mullins was

[1] "E.A." refers to Ernest Mullins' appendix in the court of appeals. "I.A." refers to Ivan Mullins' appendix in that court.

given concurrent sentences of imprisonment for two years on each of four counts (E.A. 111-112), and Ivan Mullins was given concurrent sentences of three years on each of four counts (I.A. 81-82). On appeal (E.A. 113-114; I.A. 83-84), both convictions were affirmed.

Count I, similar in form to the other seven counts, first alleged that Glen B. Garrott was the cashier of the Farmers State Bank and that "Ernest W. Mullins, Jr., and Ivan Mullins, doing business as Exterior Contracting Company, having aided and abetted the said Glen B. Garrott in committing an offense against the United States, are principals herein under the provisions of Section 2 of Title 18 of the United States Code." Paragraph 2 of that count alleged that Garrott and Ivan Mullins, "with intent to defraud * * * did wilfully misapply the sum of $45,000.00 of the moneys * * * of the Bank * * * in that Glen B. Garrott * * * did issue and deliver a Cashier's check drawn by the Bank upon itself, in the amount of $45,000.00 * * * payable to Exterior Contracting Company and endorsed Exterior Contracting Company by Ivan Mullins, when [each] * * * knew that said Cashier's check was issued without sufficient consideration * * * whereby the possession, control and use of the said sum of $45,000.00 of the moneys, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of Ivan Mullins, and diverse other persons to the Grand Jurors unknown * * *" (I.A. 9-10).

The evidence showed that Garrott, cashier of the family-operated bank, began his business association with Ernest Mullins in about 1948 or 1949 under the name of the G & T Manufacturing Company (E.A. 27, 44, 45, 54). The operation was financed by cashier's checks written by Garrott which were concealed by the use of "plugged" or fictitious bank figures (E.A. 58). Ernest Mullins thereafter started a new business under the name of Exterior Contracting Company, and hired his brother Ivan to work for Exterior for a $125 weekly salary (E.A. 65, 71; I.A. 35, 36). Although Garrott denied ownership or management participation in Exterior (E.A. 57), he continued to give financial assistance to Exterior through petitioners by using about $200,000 of his own money and $700,000 of the bank's money in paying Exterior checks drawn upon the bank without sufficient funds (E.A. 56, 63, 65; I.A. 45). Garrott also induced bank employees to enter "plugged figures" on the bank's accounts (E.A. 26, 28, 36; I.A. 17, 20, 23-24).

In 1962, Garrott, then without money of his own, devised and executed, with petitioners' knowledge, a "check kite" scheme for issuing the bank's cashier's checks for deposit by petitioners in out-of-town banks to cover Exterior's checks (E.A. 46-48, 67; I.A. 32-33, 39). The cashier's checks involved in the eight counts of the indictment (Gov. Exhibits 1 through 4 in each trial) were issued in April and May 1962 and were in amounts ranging from $42,250.00 to $110,000.00 (I.A. 9-12, 16, 25, 27; E.A. 11-14, 28-29,

44). On July 10, 1963, the bank shortage was approximately $569,596.82 (E.A. 39).

ARGUMENT

1. There is no merit to petitioners' contention that the indictment was defective because it did not charge them with having acted wilfully as aiders and abettors of Garrott's misapplication of the bank's funds. Although paragraph 1 of each count failed explicitly to use the word "wilfully," the second paragraph of each count alleged that Garrott and the petitioners "did wilfully misapply" the bank's money with intent to defraud (I.A. 9, 10, 11, 12; E.A. 11, 12, 13, 14). Nor is there substance to the claim that petitioners were charged under subsection (a) of 18 U.S.C. 2 in order to render proof of wilfulness unnecessary. The indictment, in its entirety, charged them with having wilfully aided and abetted in violation of subsection (a), not with having violated subsection (b).

2. The court instructed the jury that it could find petitioners guilty only if Garrott wilfully misapplied bank funds and if petitioners had aided and abetted Garrott wilfully to misapply the funds "with the specific intent to defraud the bank" (I.A. 63, E.A. 95-96). The court defined "wilfully" as follows (I.A. 63; E.A. 96):

> The word "wilfully" as used in the crime charged means that the act was committed voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the

> law and not by mistake, accident, or in good faith.

It defined "intent to defraud" as follows (I.A. 64, E.A. 96):

> The phrase "intent to defraud" used in the crime charged means that the act was done knowingly with the specific purpose to deceive in order to cause financial loss to another or financial gain to one's self.

Consequently, the instructions made it clear to the jury that petitioners could be guilty only if they intended to defraud the bank. There is thus no merit to petitioners' claim that the court failed to charge that "bad purpose or evil intent" was a necessary element of the offense (Pet. 14). The instruction concerning specific intent more than adequately supplied this element.

3. In counts relating to Ivan Mullins, the indictment, after charging that cashier's checks had been issued without sufficient consideration so that the bank's money was depleted and lost, further alleged that the money had been converted and misapplied to the "use and benefit of Ivan Mullins, and divers other persons to the Grand Jury unknown." The evidence failed to establish that Ivan, rather than Ernest, had been the direct beneficiary of the fraudulent cashier's checks. The district court, however, properly denied Ivan's motion for acquittal because the specific allegation was surplusage (I.A. 72-73). The offense was proved once it was shown that there had been a wilful misapplication of the bank's funds.

Who had received the direct benefit was immaterial. The court's action in disregarding the quoted phrase as surplusage was a permissible "judicial holding that a useless averment is innocuous and may be ignored." *Ford* v. *United States*, 273 U.S. 593, 602. The court did not strike words which altered the charge made in the indictment, as in *Ex parte Bain*, 121 U.S. 1, nor did it add to the allegations of the indictment so as to permit a determination of guilt on a charge different from that made by the grand jury, as in *Stirone* v. *United States*, 361 U.S. 212.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1966

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